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Supreme Court of the United States

OCTOBER TERM, 1929.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

(Italics appearing throughout this brief my own.)

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit and of the United States District Court for the District of Minnesota, Fourth Division, should be in all things affirmed because said judgments were duly rendered in accordance with certain statutes of the United States and in accordance with applicable decisions of this Honorable Court interpreting said statutes.

Official report of opinion in court below:

Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 36 Fed. (2) 180.

STATEMENT OF THE CASE.

In petitioner's "Statement of the Case," some of the facts which respondent feels are important have been omitted and, as will be pointed out later, certain assumptions or inferences are made in petitioner's "Statement of the Case," which are without any support therefore in the record.

This case is before this court on a petition for writ of certiorari directed to a judgment of the Circuit Court of Appeals for the Eighth Circuit (R. 84) rendered November 15, 1929, in favor of the respondent, upon which certiorari was granted by this Honorable Court on March 17, 1930 (R. 84).

The action was originally brought by the respondent's predecessors in interest to recover freight charges in the sum of $375.96, alleged to be due for transporting a carload of coal from Norfolk, West Virginia, to Kimball, South Dakota, consigned to the petitioner at said Kimball (R. 4). The car was loaded at Norfolk, West Virginia, June 9, 1926, and delivered to the petitioner at Kimball, South Dakota, on June 16, 1926 (R. 4).

In Paragraph IV of its answer the defendant denied that the shipment was duly transported and alleged that the plaintiff-respondent was negligent and caused loss and damage and further alleged that said loss and damage was paid by the plaintiff (R. 5), that is, the petitioner, when suit was commenced, conceded that any claim for loss or damage that they sustained on this shipment had been paid. The car of coal was unloaded and released by said petitioner at Kimball on June 19, 1926, at 5:00 P. M. (R. 17). The freight bill was presented to petitioner's agent between 2:00 and 3:00 P. M. on said June 19th (R. 17). In payment of said freight charges the respondent's agent received a check

from petitioner's agent (R. 17) drawn on the Lumbard State Bank of Kimball, payable to the Chicago, Milwaukee & St. Paul Railway Company, which contained on the face thereof the printed notation: "Collectible at par through the Federal Reserve Bank at Minneapolis" (R. 55-56).

On June 16, 1926, respondent's treasurer wrote to respondent's agent at Kimball that he had noticed by statement of June 8, 1926, that the cash reserve of the Lumbard State Bank was very low and collections in excess of $500.00 should not be exchanged at the Lumbard State Bank and further advised him that if he felt there was any question about the financial responsibility of the bank he was to send his collections direct to the depository at Chicago (R. 73). The agent at Kimball was further instructed:

> "Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals" (R. 73).

Respondent had no account in the Lumbard State Bank while the petitioner did have an account and, therefore, was in a better position than respondent to know the financial condition of the bank (R. 29 and 33). The petitioner got statements from the bank showing the cash balances in the bank and in a general way knew the condition of the bank (R. 40 and 41). The petitioner was a responsible company (R. 35). Dickie, the respondent's assistant treasurer, who actually issued the instructions to respondent's agent at Kimball, did not know that many of the shippers had accounts in the local banks (R. 35). The petitioner had its head offices at Minneapolis, Minnesota. Dickie testified that he did not have sufficient information to advise shippers that respondent felt that the Lumbard State Bank was in

financial difficulties (R. 35), but he knew conditions were bad in some twenty-five, thirty or fifty other places in South Dakota and western Iowa, where he had instructed agents to send checks direct to respondent's depository (R. 34).

The proof showed that petitioner had a bank balance in the Lumbard State Bank sufficient to pay the check in question but there is no proof that the bank had cash on hand on June 19th or any subsequent date sufficient to pay the check of $375.96.

Respondent's agent, after receiving the check on June 19th, put it in his cash drawer at the depot (R. 18) and forwarded it by the first train (R. 41) which was on the next morning, Sunday, June 20th (R. 19) with certain other checks and currency, direct to his depository, the Central Trust Company of Illinois at Chicago (R. 19). Upon receipt of the check the Central Trust Company on June 22 endorsed the check for respondent (R. 30 and 31). The check then went to the Federal Reserve Bank at Minneapolis (R. 31) and was endorsed by that bank on June 23 (see Exhibit C, R. 55-56).

The record does not show if the Federal Reserve Bank held the check in its bank or whether it forwarded it to the Lumbard State Bank. As it was collectible at par through the Federal Reserve Bank at Minneapolis, it may have been retained in that bank. The Lumbard State Bank closed its doors at noon on June 25, 1926 (R. 26).

The petitioner introduced in evidence a large number of checks (R. 57 to 72) which were paid at the Lumbard State Bank during the years 1925 and 1926. Only two of these checks were cashed after June 19th; one a check of merely $50.00 was cashed on June 23rd (R. 41) and one, a check of $20.55 was cashed on June 24th (R. 41). On June 23rd the petitioner deposited $286.88 in the bank (R. 42) and on

June 24th got a bank draft from the Lumbard State Bank for $300.00 (R. 41). The bank draft, apparently, was never paid (R. 42).

The check, of course, when it was refused, was returned to the Treasury Department of the railroad. Some little time after the transactions described herein a claim was made by the petitioner to the Overcharge Department of the respondent and that department, upon the receipted freight bill and upon a showing that the weight was incorrect, paid the petitioner $4.26 (R. 36). The receipted freight bill would indicate to the Overcharge Department that the $375.96 had actually been paid. This overcharge indicates that the proper charges on the shipment were $371.70. The respondent received check which never was paid. The respondent, therefore, was out the sum of $371.70, tariff charges, and also the $4.26 which had been erroneously paid by the respondent's Overcharge Department under the impression that the petitioner had actually not only paid the full tariff charges but an excess of $4.26. Therefore, the respondent, if the check did not constitute a payment, was outstanding the sum of $375.96, the amount sued for and the amount entered in the judgments here involved.

The trial court, in his original findings, stated that both parties knew that the Lumbard State Bank at Kimball was not in the best of financial circumstances at the time of the execution of the check (R. 13).

STATEMENTS MADE BY PETITIONER UNSUPPORTED BY RECORD.

A few statements made in petitioner's "Statement of the Case" seems to be without any support in the record.

On page 4, commencing on the last line of petitioner's brief, the statement is made:

> "The check was not presented for payment at the Lumbard State Bank at Kimball, the bank on which it was drawn, until June 28, 1926, nine days after it had been delivered to the railroad company's agent" (R. 38-55).

There is absolutely no support for this statement in the record and so far as the record shows and so far as the writer of this brief knows, the check never was actually forwarded by the Federal Reserve Bank to the Lumbard State Bank.

It will be noted that the check was endorsed by the Federal Reserve Bank at Minneapolis on June 23rd, as shown by Plaintiff's Exhibit C, the check itself (R. 55-56).

On page 5 of petitioner's brief, commencing on the 10th line, petitioner states:

> "But when the check, Exhibit C, was put in evidence by respondent, it had attached to it the bank slip showing presentment and refusal on the 28th, as we recall it; and, at all events, it was after the bank closed on Friday noon of June 25."

This is not based upon any testimony in the case and is not correct. The slip of paper which was taken from the check at the time it was introduced in evidence and which is in the writer's file, reads as follows:

> "Returned by
> Central Trust Company of Illinois
> To.....
> For Bank reported closed."

The original slip, just quoted, has been attached to the end of respondent's original brief.

Plaintiff's Exhibit C, the check in question, contained the printed notation:

> "Collectible at par through the Federal Reserve Bank at Minneapolis."

Apparently the last endorsement made upon the check was the following:

> "Payable to the order of any Bank, Banker or Trust Company. All prior endorsements guaranteed. June 23, 1926. Federal Reserve Bank, Minneapolis, Minn."

There is no proof that the Federal Reserve Bank at Minneapolis actually forwarded this check to the Lumbard State Bank and there is no proof that it was necessary for it to do so. The question as to whether or not it was forwarded to the Lumbard State Bank is wholly without proof in the record. If we are to assume that it was forwarded and if the Federal Reserve Bank forwarded it at the close of business on June 23rd, the date on which it endorsed the check, the check should have been received at the Lumbard State Bank on the afternoon of June 24th, or in other words, the day before the bank closed. There is no proof that the check was not to be paid at Minneapolis and no proof that the check was sent to the Lumbard State Bank and if it was sent to the Lumbard State Bank there is no proof as to whether it arrived there on June 24th or June 25th before the bank closed or whether it arrived after the bank closed.

In this connection we again call the court's attention to the fact that on June 24th the petitioner obtained a bank draft from the Lumbard State Bank in the sum of $300.00 (R. 41) and that this draft apparently was not paid (R. 42) and we further call attention to the fact that the only two checks which were cashed after June 19th only totaled $70.55 and to the fact that the petitioner, on June 23rd,

alone had deposited four times that amount in the bank (R. 42). There is no proof that if presented for payment between June 19th and June 25th, the bank could or would pay the check.

The statement is made in petitioner's brief, on page 5, commencing with the 16th line:

> "If Mr. Gustafson, the Milwaukee agent, had immediately obtained from the bank the currency called for by the check, or if the bank had not closed its doors, the check would have been paid when it arrived and the controversy involved in this litigation would not have arisen."

As stated, there is absolutely no proof to show that the bank was at any time able to pay the check for $375.96 from the day it was received by the respondent until the bank closed.

On page 5 of petitioner's brief the statement is further made:

> "It is not denied that an individual is under the duty of presenting the check for payment on the same or next succeeding business day, but the railroad contends that a ruling of the Interstate Commerce Commission protects it from the effect of the rules of law which ordinarily govern such a situation."

The respondent does not concede that an individual would be required to cash the check at Kimball if his own account were in a bank in Chicago and if the check bore the notation that the check was collectible at par through the Federal Reserve Bank at Minneapolis. We do not concede that with knowledge no greater than that of petitioner that we are negligent in sending the check to our depository at Chicago when the petitioner on the day preceding the closing of the

bank obtained a bank draft from the Lumbard State Bank instead of obtaining cash. Certainly there is no proof that if the petitioner knew its check was to be sent to Chicago that it would have objected thereto.

The writer of this brief is not personally familiar with most of the matters referred to in Mr. Root's letter of August 18, 1930, or in the majority of the statements made in the appendix to petitioner's brief. His only connection with the matter was to prepare and sign a satisfaction of the judgment which he then assumed would be filed and dispose of the case. The appendix and Mr. Root's letter both show the settlement was a conditional one only contingent upon the final determination of the matter on this appeal.

Inasmuch as both parties desire a decision of this matter on its merits and are willing to have the rights and liabilities of the parties governed by the decision of this court any answer to the appendix would seem to be unnecessary.

ARGUMENT.

THE INTERSTATE COMMERCE ACT AND THE ELKINS AND HEPBURN AMENDMENTS TO SAID ACT, AS WELL AS THE TRANSPORTATION ACT OF 1920, PREVENTED THE INTERVENTION OF PETITIONER'S COUNTERCLAIM IN THE INSTANT CASE.

Sec. 2 of the Interstate Commerce Act of Feb. 4, 1887, Chapter 104, Sec. 2, 24 Stat. 379; as amended February 28, 1920, Chap. 91, Sec. 404, 41 Stat. 479, Sec. 2, Title 49, of U. S. C., Subds. 1 and 2 of Sec. 3 of the Interstate Commerce Act of Feb. 4, 1887, Chap. 104, Sec. 3, 24 Stat. 380; as amended Feb. 28, 1920, Chap. 91, Sec. 405, 41 Stat. 479, Subds. 1 and 2 of Sec. 3, Title 49, of U. S. C., Sec. 1 of the Elkins Amendment to the Interstate Commerce Act, Chap. 708, Sec. 1, Feb. 19, 1903, 32 Stat. 847; as amended June 29,

1906, Chap. 3591, Sec. 2, 34 Stat. 587, Sec. 41, Title 49, of U. S. C.; The Hepburn Amendment to the Interstate Commerce Act of Feb. 4, 1887, Chap. 104, Sec. 6, 24 Stat. 380, as amended March 2, 1889, Chap. 382, Sec. 1, 25 Stat. 855; as amended June 29, 1930, Chap. 3591, Sec. 2, 34 Stat. 586; as amended June 18, 1910, Chap. 309, Sec. 9, 36 Stat. 548; as amended Aug. 24, 1912, Chap. 390, Sec. 11, 37 Stat. 568; as amended Aug. 29, 1916, Chap. 417, 39 Stat. 604; as amended Feb. 28, 1920, Chap. 91, Secs. 409 to 413, 41 Stat. 483; Subd. 7, Sec. 6, Title 49, of U. S. C., prevent counterclaims from being interposed in actions for freight tariff charges on shipments moving in interstate commerce, except in so far as such right to counterclaim is allowed under the decision of this Court in the case of *Chicago & Northwestern Ry. Co. v. Lindell, infra.* For the convenience of the court the material portions of the aforesaid Acts are set out in the Appendix to this brief.

The Elkins Act, so far as here material, makes it unlawful for any person, persons or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate commerce or whereby any other advantage is given or discrimination is practiced.

A summary of the decisions shows a failure to collect royalty on mining lands leased to a shipper, or to lease property to a shipper at less than its full market rental, the making of a donation to aid an industry in building on a particular railroad or the giving of more extensive credit to certain shippers than others in a like situation constitute violations of the Elkins Act.

N. C. Ry. Co. vs. U. S., 241 Fed. 25.

Vandalia Ry. vs. U. S., 226 Fed. 713. Writ of Certiorari denied 239 U. S. 642, 36 Sup. Ct. 163.

Cent. of Georgia vs. Blount, 238 Fed. 292.

Fireproof Storage Co. vs. Hines, 261 Fed. 215.

Southern Pacific Terminal Co. vs. I. C. C. and Young, 219 U. S. 498, 31 S. C. 279.

U. S. vs. Union Stockyards & Transit Co. of Chicago, 226 U. S. 286, 33 Sup. Ct. 83.

U. S. vs. Lehigh Valley Ry. Co., et al., 254 U. S. 255, 41 Sup. Ct. 104.

A violation occurs even though no actual discrimination between shippers is shown.

Pa. Co. vs. U. S., 257 Fed. 261, 264.

Hocking Valley Ry. Co. vs. U. S., 210 Fed. 735.

U. S. vs. Metropolitan Lbr. Co., 254 Fed. 335.

C. & A. Ry. Co. vs. U. S., 156 Fed. 558.

The mere offer or solicitation of the rebate is sufficient.

U. S. vs. Lehigh Valley Ry. Co., 254 Fed. 332.

The purposely doing a thing prevented by the Act constitutes an offense under the Act even though the party in question did not intend to violate the Act.

U. S. vs. Erie Railway, 222 Fed. 444.

Armour Packing Co. vs. U. S., 209 U. S. 56, 28 Sup. Ct. 428.

C. St. P. M. & O. Ry. Co. vs. U. S., 162 Fed. 835.

The giving of preference by means of consent judgments or waivers of defenses available to the carrier constitute offenses under the Interstate Commerce Act.

Phillips Co. vs. Grand Trunk Ry., 236 U. S. 662, 35 Sup. Ct. 444.

Railroad carriers and shippers cannot compromise claims for freight, passenger or other tariff charges and cannot prevent the collection of the full tariff charges by virtue of

lawful contracts as to charges to be collected which were duly entered into prior to the passage of the State and Federal Acts relating to such charges.

Armour Packing Co. vs. U. S., supra.

C. & O. Ry. vs. Standard Lumber Co., 174 Fed. 107.

M. St. P. & S. S. M. Ry. Co. vs. Menasha Wooden Ware Co., 159 Wis. 130, 150 N. W. 411. Writ of certiorari denied.

Menasha Wooden Ware Co. vs. M. St. P. & S. S. M. Ry. Co., 245 U. S. 663, 38 Sup. Ct. 133.

C. B. & Q. Ry. Co. vs. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513.

Milwaukee Electric Co. vs. Wisconsin Railroad Com., 238 U. S. 174, 35 Sup. Ct. 820.

Raymond Lbr. Co. vs. Raymond Light and Water Co., et al., 92 Wash. 330, 159 Pac. 133.

Tariff charges must be collected at destination before the possession of any freight transported is relinquished except as provided by rules and regulations of the Interstate Commerce Commission. The Commission has permitted extensions of credit in some cases not exceeding 96 hours. In re: Sec. 3 of the Interstate Commerce Act as amended by Sec. 405 of the Transportation Act of 1920 in *Ex Parte* No. 73, 57 I. C. C. 591, 596, 596-a and 596-b.

The assertion by a shipper of the right to counterclaim particularly in unliquidated claims in actions which have been brought to recover railroad tariff charges in the state courts at congested centers, such as Hennepin County, Minnesota, and Cook County, Illinois, will of necessity delay the payment of freight charges for periods from eight months to three years, until the unliquidated counterclaim is reduced to a judgment after trial. The shipper, in asserting

a counterclaim in such cases unduly postpones the collection of the carrier's charges and thereby nullifies, to a considerable extent, the effect of the above mentioned statutes and regulations of the Commission.

A brief discussion of the decisions relating to the question as to whether a claim for damages can be set up as a counterclaim may be helpful.

A Review of Conflicting Authorities as to Whether or Not a Claim for Damages Can Be Set Up as a Counterclaim in an Action Brought to Recover Interstate Tariff Charges of a Railroad.

Decisions in which counterclaims were held to be proper.

In *Wells-Fargo Co. vs. Cuneo*, 241 Fed. 727, the District Court for the Southern District of New York held in an action to recover a tariff charge that set-offs and counterclaims were pleadable and apparently relied upon the policy of the law to settle germane controversies in one action instead of two.

It is worthy of note that the court erroneously assumed that the mere fact of delivery of goods for shipment imparts, under the Interstate Commerce Act, as a matter of law, an absolute promise to pay freight charges and that an agreement to the contrary is void. This is pointed out in the note appended to the case.

L. & N. Ry. Co. vs. Cent. Iron Co., 265 U. S. 59, 69, 44 Sup. Ct. 441, 443.

Therefore, the Cuneo case, in part, has been disapproved by this Court.

Cases holding substantially the same as the Cuneo case are:

C. & N. W. Ry. Co. vs. E. C. Tecktonius Mfg. Co. (E. D. of Wis.), 262 Fed. 715.

N. Y. C. vs. Fed. Fuel Refining Co., 201 App. Div. 466, 194 N. Y. Sup. 467, which was reversed on ground here not material in 235 N. Y. 182.

N. C. & St. L. Ry. vs. Tennere Mill Co., 143 Tenn. 237.

Cent. of Georgia vs. Birmingham Sand & Brick Co., 9 Ala. App. 419, 64 Southern 202.

Pennsylvania Railroad vs. Bellingham, 101 N. Y. Misc. Rep. 105, 166 N. Y. Sup. 652.

In the case of *C. M. & St. P. Ry. Co. vs. Pioneer Grain Corp.*, 26 Fed. (2) 90, the Court considered the matter as a doubtful one and later the court, in an effort to have the matter passed upon by the Circuit Court of Appeals, reversed its order in 26 Fed. (2) 90 and granted the motion to strike the counterclaim. An appeal was dismissed by the Circuit Court of Appeals without deciding the question. Defendant again moved to reinstate the counterclaim and the motion has not been decided: The honorable trial court, we understand, expects the decision in the instant case will point the way to a correct solution.

The Pioneer Grain Corporation case has been in the Federal Court for years and is a striking example of the effect of delay upon payment of tariff charges by reason of the interposition of counterclaims. The Pioneer Grain Corporation case involved the matter of payment of certain demurrage charges covering two periods of time. Charges in the amount of about $2,300.00 were at one time conceded to be due by the Pioneer Grain Corporation; other demurrage charges, however, which were something in excess of one thousand dollars were in dispute. The Railroad Company, believing that all of the charges were due, and believing that

they could not compromise the disputed charges, brought suit to recover all of the charges and a counterclaim then for the first time, was interposed for alleged discrimination in the distribution of cars, which the investigation of and defense to by the carrier would be very expensive as it involved the handling of cars over a long period of time and also involved the checking and compiling of records not only of the plaintiff carrier but of many other railroads at Minneapolis. Since the action was commenced the Pioneer Grain Corporation has discontinued doing business and the probabilities of collecting charges by the carrier, if a judgment is obtained, is doubtful.

The absolute obligation of collecting its full tariff charges is placed upon the carrier. In many instances the carrier, if it lawfully could do so, would prefer to accept the amount which the shipper offers to pay rather than litigate the matter. If counterclaims can be properly interposed in actions brought to recover tariff charges and such actions can be compromised by the parties, the tendency will be to compromise the counterclaim for the amount of the tariff charges.

In Minnesota most actions which are compromised before a trial are disposed of by merely filing stipulation of dismissal with the clerk of the court and no order or judgment of dismissal is obtained.

In *Payne vs. Clark* (S. D. of Cal.), 271 Fed. 525, the Court apparently was influenced by the provisions of Sec. 439 of the Code of Civil Procedure of California, which provides:

> "If the defendant omits to set up a counterclaim upon a cause of action arising out of the transportation set forth in the complaint as a foundation of plaintiff's claim, neither he nor his assignees can afterwards maintain an action against the plaintiff therefor."

Also by Sec. 440 of the California Code, which provides:

> "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or debt of the other."

The statutes just quoted also were applicable in the case of *C. & N. W. Ry. Co. vs. O. N. Lindell, infra.* The Lindell case is of such importance inasmuch as it is the only expression of this Honorable Court, that we will discuss it separately and point out features distinguishing it from the instant case.

Cases holding that counterclaim cannot be interposed.

There are many well-reasoned decisions holding that counterclaims should not be permitted in actions brought to recover transportation charges and we call the Honorable Court's attention to the following cases so holding:

Ill. Cent. Ry. Co. vs. Hoopes & Son (D. C. of Southern Dist., Iowa), 233 Fed. 135.

C. & N. W. Ry. Co. vs. Stein & Co. (D. C. of Neb.), 233 Fed. 760.

Johnson, Brown & Co. vs. D. L. & W. R. Co. (D. C., Southern Dist., Ga.), 239 Fed. 590.

Pa. Ry. Co. vs. South Carolina Prod. Assn. (D. C. E. D. of S. C.), 25 Fed. (2) 315.

Mich. Cent. Ry. Co. vs. Carl and W. J. Piowaty (D. C., N. D., Ill., E. D.), 36 Fed. (2) 604.

We understand, in the case just cited, in March or April,

1930, the trial judge reversed his ruling and reinstated the counterclaim, being of the view that the Lindell case, *infra*, required such change. This latter decision, so far as we know, has not been reported.

Oregon, Washington R. R. & Navigation Co. vs. Cascade Construction Co., 101 Oregon 582, 197 Pac. 1085.

D. L. & W. Ry. Co. vs. Henry Nuhs Co., 93 N. J. Law 309, 111 Atl. 223.

Adams Express Co. vs. Albright Bros., 75 Pa. Sup. Ct. 410.

Busch vs. Keystone Driller Co., 199 Mo. App. 152, 199 S. W. 597.

Yazoo, etc., Ry. Co. vs. Searles, 85 Miss. 520, 37 Southern 939.

The decision of the Circuit Court of Appeals in the instant case sets out very ably the reasons why the above courts refuse to permit the counterclaims to be interposed in claims brought to recover railroad tariff charges.

We take the liberty of quoting rather extensively from this opinion. On page 187 the Honorable Circuit Court of Appeals states as follows:

> "(2) On the question whether a counterclaim for damages for losses arising out of the shipment may be interposed in this kind of an action to collect freight charges, there is conflict of federal decisions. It appears that the trial courts in this circuit confine the issues and the trial in the cases to the freight charges, and we think this conforms to the intent of Congress reflected in the acts relating to interstate commerce. A paramount purpose of the regulation of carriers is to compel uniform treatment of shippers, and the exaction

of the published freight charges in cash payment from each and all shippers alike is a necessary step. To that end carriers are compelled to sue where through mistake or otherwise an undercharge has been made or collection has failed, and such suits are often burdensome to the carriers and instituted with reluctance by them. If the suits are to afford occasion to litigate all the various claims shippers may make against carriers, the whole intent and purpose of Congress will be defeated. Instead of an aid to the uniform collection of the same cash charges from all shippers, the suits would inevitably open the door to gross discriminations under color of counter-claims and offsets which the courts could not prevent. In fact, a measure of discrimination is present as soon as a counter-claim is permitted in a carrier's suit for freight charges. Shippers who have rare dealings with carriers and no claims must submit to judgment as soon as their cases are reached and their debt for freight charges proved against them. Other shippers who have frequent dealings and claims may wait until issues are formulated upon their counter-claims or offsets and then they cannot be adjudged to pay their freight charges until all such matters of counter-claim and offset have also been litigated and determined. At the end of the litigation such shippers, if successful, will not be compelled like others to pay their freight charges in cash, but their freight bills will practically be otherwise discharged. Discriminations and preferences have taken many forms in the past and the intention of Congress to abolish them all is clear. The federal courts are also bound to the same purpose, and, as the practice of permitting counterclaims in these suits tends to defeat the purpose, the practice should not be permitted

even though there is a statute of the state sanctioning counterclaims generally in law actions."

It will be noted in the above quotation that the court states that such counterclaims should not be permitted even though the state statute sanctions such counterclaims. The situation, however, might be quite different if the statutes of Minnesota were like the California statute, which requires that counterclaims be interposed in an action brought to recover charges on the same shipment.

Some additional reasons for sustaining the above case will be set out in our discussion of the Lindell case, *infra*.

THE HEPBURN ACT REQUIRES CARRIERS TO COLLECT AND SHIPPERS TO PAY THE FULL TARIFF RATES AND CHARGES IN MONEY ONLY.

The petitioner wishes to give the impression that the respondent carrier owed the sole duty to see that the check was cashed and that money was received to pay the outstanding freight charges. This is not an exclusive duty or obligation on the part of the carrier but it is a duty which is also owed by the shipper or consignee of the freight. If the Lumbard State Bank actually was solvent on June 19th, the petitioner could have gone to the Lumbard State Bank and obtained cash and turned it over to the agent of respondent at Kimball in payment of the charges. The record shows that the petitioner's office at Kimball was only two and one-half blocks from the Lumbard State Bank (R. 24).

In *L. & N. Ry. Co. vs. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 495, this Honorable Court brings out the fact that shippers as well as carriers must see that the proper charge is paid. On page 495 this court said:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

The record shows, as previously outlined, that the shipment involved a movement from Norfolk, West Virginia, to Kimball, South Dakota (R. 18). The petitioner, of course, knew that the respondent's line of railroad did not extend to Norfolk, West Virginia, and therefore knew that it, for at least a considerable portion of the aforesaid charges, was merely acting as agent for other railroad carriers and as the respondent for a considerable portion of the charges was the agent only it would seem that the petitioner by reason thereof was presumed to know that the respondent was authorized to receive money only in payment of the charges of its principal.

This Honorable Court has held that a collecting agent is without authority to accept for the debt of his principal anything but what the law decrees to be legal tender or which is by common consent considered and treated as money and passes as such at par.

See *Ward vs. Smith*, 7 Wallace, 447, 452, 19 Law Ed. 207

Federal Reserve Bank of Richmond vs. Malloy, 264 U. S.

160, 68 L. Ed. 617, 44 Sup. Ct. Rep. 296, affirming *Federal Reserve Bank of Richmond vs. Malloy, et al.* (4th Circuit), 291 Fed. 763, and *Malloy v. Federal Reserve Bank of Richmond*, 291 Fed. 997.

The obligation of petitioner to pay the freight charges had not been performed until the freight charges were actually paid in money.

It is respondent's position that the giving of this check did not constitute a payment of the freight charges for the reason that freight charges must be paid in cash or other legal tender and that until such check was actually cashed and the money deposited to the account of the respondent or the cash received by the respondent, the obligation on the part of the petitioner to pay the charges had not been discharged.

Certain decisions we think are conclusive on this matter and we first call the court's attention to a rule of the Interstate Commerce Commission adopted by that Commission on September 15, 1906, known as Conference Ruling 207, reading as follows:

> "207. PAYMENT FOR TRANSPORTATION.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

This ruling has been referred to and approved by this court in the case of *L. & N. Ry. Co. vs. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 268. In that case, on page 268, this court said:

> "In our opinion, after the passage of the commerce act, the railroad company could not lawfully accept from Mottley and wife any compensation 'different' in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule *were payable only in money.*"

On the same page, the court further says:

> "*That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its Conference Rulings* (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time precludes the acceptance of service, property, or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute."

On the same page the court further says:

> "The statute manifestly means that the *purchase of* a transportation *ticket by a passenger*, and its sale by

the company, shall be consummated only by the former *paying cash* and by the latter *receiving cash* of the amount specified in the published tariffs."

The United States Supreme Court again went into this matter very carefully in the case of *C. I. & L. Ry. Co. vs. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 274. On page 274 this court said:

"The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for *in money*, which has a certain value, known to all, and not in commodities or services, or otherwise than in money."

In *Lake & Export Coal Corp. vs. C. & O. Ry. Co.* (4th Circuit) 1 Fed. (2d) 968, in referring to the Gray case, *infra*, the court said:

"It was held that he was entitled to demand that sum in money from the railroad, it was not permitted to furnish it to him in transportation. In short, he would have to buy tickets, and it would have to *pay* him what it owed him *in cash*, and not in passes."

See also *N. Y. C. & H. R. R. Co. vs. Gray*, 239 U. S. 583, 36 Sup. Ct. 176.

Pennsylvania Railroad Co. vs. South Carolina Producers Assn., 25 Fed. (2) 315, 317.

In *C. & N. W. Ry. Co. vs. William S. Stein Co.*, 233 Fed. 716, the court said:

"Under the Acts of Congress relating to the transpor-

tation of interstate commerce, as construed by the Supreme Court of the United States in *Louisville & Nashville Railroad Company vs. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, and in *Chicago, Indianapolis & Louisville Railway Company vs. United States*, 219 U. S. 286, 31 Sup. Ct. 272, 55 L. Ed. 305, the carriers cannot accept in payment for the transportation of interstate commerce *anything but cash*, and no contract, however fair, looking to the payment for such services by an exchange of commodities can stand."

See also *L. & N. R. Co. vs. Maxwell, supra.*

A. J. Phillips Co. vs. G. T. & W. Ry. Co. et al., supra.

It is the respondent's position that the giving of the check did not discharge the liability of the petitioner for the freight charges until the respondent railway company had received money to cover the charges.

In *Eggleston vs. Plowman, County Treasurer*, 49 S. D. 609, 207 N. W. 981, a taxpayer gave a draft to the county treasurer in payment of taxes and said treasurer neglected to present the draft to the bank for three weeks. In the meantime the bank failed. The Supreme Court of South Dakota held mandamus would not lie to compel the issuance of a tax receipt for the reason the taxes were not paid until cash had been received by the county treasurer. On pages 981 and 982 the court said:

"This proceeding is by the property owner himself against the defendant in his official capacity as a county officer seeking to compel the performance of an official duty, namely, the issuance of a tax receipt, which receipt the officer has no right to issue until the taxes are

paid. Section 6765, Rev. Code 1919.

"A county treasurer has no authority to accept anything other than money in payment of taxes, excepting in such instances, not here material, as the statute expressly otherwise provides, and in the instant case the treasurer had no right to accept the draft as payment of the tax, and did not in fact undertake or agree so to accept the draft.

"*It is the usual rule, in the absence of an express agreement otherwise, that payment by draft or check is conditional payment only, ripening into absolute payment when the draft or check is in fact paid.* These propositions are conceded by appellant, but he undertakes to apply to the defendant as a public official the same rule that would obtain between private individuals, and to maintain that the draft, although conditional payment only when offered, yet, having been retained by the defendant instead of being refused and returned, defendant's want of diligence in presenting it for payment operates to extinguish plaintiff's obligation.

"*We are of the opinion that this rule, applicable between private individuals, cannot govern as between an individual, whose duty it is under the law to pay his taxes and pay them in money, and a public officer, whose duty it is to collect the taxes and collect them in money.*"

The language just quoted applies with equal force to the instant case, to-wit: It is the usual rule, in the absence of an express agreement otherwise, that payment by draft or check is conditional payment only, ripening into absolute payment when the draft or check is in fact paid. * * * We are of the opinion that this rule, applicable between private individuals, cannot govern as between an individual,

whose duty is under the law to pay freight charges and pay them in money, and a *quasi*-public corporation, whose duty it is to collect freight charges and collect them in money.

We have the same situation in the instant case that existed in the Eggleston case. In our case freight charges can be paid in cash only and if any other device is used to pay the charges the debt is not discharged until cash is actually received by the railway company for the charges.

The statement on the check "Collectible at Par through Federal Reserve Bank at Minneapolis" justified the respondent in sending said check to its depository at Chicago to be sent to the Federal Reserve Bank at Minneapolis for collection.

The Central Trust Company of Illinois at Chicago was the depository for the respondent. The Lumbard State Bank was not a depository for the respondent.

No proof was introduced by the petitioner that the sending of the check to respondent's depository at Chicago from which it was forwarded to the Federal Reserve Bank at Minneapolis was negligent or improper.

We believe the case of *Spokane Valley State Bank vs. Lutes, et al.*, 133 Wash. 66, 233 Pac. 308, indicates that this check was handled in at least one of the customary manners of handling checks of this character and we call the court's attention to the following quotation in said opinion, appearing on page 310:

> "There appears to be some contention that it was negligence for the Exchange National Bank to send the draft for collection through the Federal Reserve Bank rather than sending it direct to Billings. The evidence shows that this was in accordance with the custom of banks. If the custom was a general one, as the evidence shows, and was reasonable, the appellants were bound

by it, even though it was not actually known to them at the time they placed the certificate of deposit with the respondent for collection, according to the weight of authority, though there are cases holding the other way. The prevailing rule appears to be that the general usage and customs of banks in making collections will bind persons dealing with them in this business, whether such usage or custom be known or not; this upon the theory that, when a person hands over a negotiable instrument to a bank for collection without remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course. Either he knows and approves of the ordinary and customary way that collections are handled by banks, or he voluntarily trusts to the wisdom of the bank in handling the matter. He impliedly consents to its collection in the usual and ordinary way."

A check is not money. In South Dakota a payment by check is a conditional one only.

In the *American and English Encyclopedia of Law*, Second Edition, Volume 20, page 837, money is defined as follows:

"Money is defined as that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, *being accepted equally without reference to the character or credit of the person who offers it* and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities."

In this connection we call the court's particular attention

to Defendant's Exhibit 4 which is a letter from the treasurer of the plaintiff to the agent at Kimball in which he states:

> "Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals" (R. 73).

It is clear, therefore, that this check was accepted because of the good credit of the Fullerton Lumber Company and this and other checks, of course, are dependent upon the character or credit of the payor and, therefore, are not money.

The following note appears in the *American and English Encyclopedia of Law*, Section Edition, Vol. 20, page 838:

> "In *Wills vs. Allison*, 4 Heisk. (Tenn.) 392, it was said: 'Money,' said Sir William Blackstone, 'is the universal medium or common standard, by comparison with which the value of all merchandise may be ascertained; or, it is a sign which represents the value of all commodities.' 1 *Black Com.* 276; *Sto. on Con.*, Sec. 1118. And so it is defined by Lord Ellenborough in 13 *East* 20; and by Chancellor Kent in *Mann vs. Mann*, 1 Johns. Ch. (N. Y.) 236, to be cash, that is, gold and silver, or the lawful circulating medium of the country—including banknotes, when they are known and approved of, and used in the market as cash.' Standard of Value.—'Money is not only a medium of exchange, but it is a standard of value.' Per *Field*, J., dissenting, in *Legal Tender Case*, 110 U. S. 462, 4 Sup. Ct. R. 137, 138."

A check clearly does not come within the definition of money referred to above. It is neither a universal medium nor common standard by which the value of merchandise

may be ascertained, it is not a standard of value and its value does depend upon the character and credit of the person who offers it.

In *Townsend vs. Swallow, et al.*, 91 Nebr. 564, 136 N. W. 730, in a syllabus by the court, it is said:

> "A decree for the payment of money means lawful money of the United States; the creditor is not required to receive private checks as a compliance with the decree."

Freight charges on goods moving in interstate commerce can be paid in money or cash only.

The Interstate Commerce Commission in *California Sugar & White Pine Company vs. Director General, as Agent*, 73 I. C. C. Reports, 338, at page 339, said:

> "The Interstate Commerce Act prohibits a carrier from charging, demanding, collecting or receiving a greater or less or different compensation than that specified in its tariffs, and *nothing but money* can be lawfully accepted in payment for transportation subject to the act."

See also decision of said Commission in "*Payment of Charges in United States Currency*," 59 I. C. C. 263.

The payment of these charges took place in the state of South Dakota. The Supreme Court of that state clearly held that payment by a check is not a payment in money and is a conditional payment only and such payment becomes absolute only when the check is in fact paid.

See *Eggleston vs. Plowman, County Treasurer, supra.*

The Transportation Act of 1920 and the Order of the Commission in Ex Parte No. 73 require carriers to promptly collect all tariff rates and charges in at least 96 hours.

Subdivision 2 of Section 3 of the Interstate Commerce Act as amended by Section 405 of the Transportation Act of 1920, 24 *Statutes at Large* 379, 41 *Statutes at Large* 479, provides as follows:

> "(2) From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided*, that the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof or for any state or territory or political subdivision thereof, or for the District of Columbia."

It will be noted that the provision authorizes and directs the Interstate Commerce Commission to fix rules and regulations concerning the payment of freight and demurrage charges. Pursuant to this direction and authorization the Interstate Commerce Commission in *Ex Parte No. 73*, 57 I. C. C. 591, at page 596, stated as follows:

> "The rules and regulations which we promulgate should contemplate the collection of transportation charges prior to, or contemporaneous with, the delivery

of most shipments, and, while adhering to the principle of prompt payment of charges, should, upon certain freight traffic, give opportunity for the preparation of freight bills at destination, weights to be ascertained after the carriers have relinquished possession of freight, and for the presentation of freight bills to the appropirate offices and employees of shippers by United States mail, by messenger, or by other proper means, and for payment of the charges in the regular course of business by the shippers. An order will be issued in accordance with these conclusions."

The order in said proceeding, which fixes a maximum limit of ninety-six hours in which freight and demurrage charges may be paid, with a few exceptions not material herein, is found in 57 I. C. C. at pages 596-a and 596-b. The order itself is also quoted, for convenience, in the appendix. This order has been modified in three subsequent decisions to permit special relief on certain specified traffic not here material. The decisions are *Ex Parte No. 73*, I. C. C. 456, 63 I. C. C. 375 and 69 I. C. C. 351.

No exception is made by the Interstate Commerce Commission which permits shippers or consignees receiving freight to withhold payment of freight or demurrage charges because of a set-off or counterclaim against the carrier.

Permitting shippers and consignees of freight to delay payment of freight or other tariff charges pending the disposition of claims made by them upon transactions taking place after the transportation is complete or upon other shipments, nullifies the effect of said Sec. 3 and *Ex Parte No. 73.*

The Lindell case does not permit a counter-claim to be interposed in an action to recover tariff charges unless said counterclaim is based upon the identical shipment and then only in case the applicable State statute requires the counter-claim to be so interposed.

In *C. & N. Ry. Co. vs. O. N. Lindell,* 281 U. S. 14, 50 Sup. Ct. 200, the Circuit Court of Appeals for the Ninth Circuit certified the following quoted question to this Honorable Court requesting instructions thereon, which appears on page 200 of the decision:

> "Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district *where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and,* further, that where such cross-claims have existed 'the two demands shall be deemed compensated,' is the *shipper acting in good faith and without collusion, debarred* by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of set-off, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the *identical shipment?*" (Italics my own.)

This Honorable Court held that the counter-claim could be interposed. The decision contains some rather broad language. In view of the importance of the question involved

we trust it is proper for us to set out reasons why the decision in its future application should be restricted to the facts in that case. We call attention to the following appearing on page 201:

> "The practice of determining claims of shippers for loss or damage in suits brought by carriers to collect transportation charges is not repugnant to the rule prohibiting the payment of such charges otherwise than in money. The *adjudication in one suit* of the respective claims of plaintiff and defendant is the practical *equivalent of charging a judgment obtained in one action against that secured in another.* Neither is to be distinguished from payment in money." (Italics my own.)

The above quotation takes care of a situation where the counterclaim is interposed in an action brought for transportation charges and after a trial a judgment is entered in the main action and in the counterclaim. The opinion is expressed that the off-setting of one judgment as against the other cannot be distinguished from a payment in money. The majority of lawsuits, however, are disposed of before a final adjudication by the court. In claims for loss and damage and discrimination, in most cases the damages are liquidated. If the parties are to agree upon the amount to be paid upon the counterclaim and then offset it as against the freight charges it cannot be said that the transportation charges have been paid in money. If the mere agreement of parties as to the value of a claim or an article is sufficient, we are unable to distinguish the decisions of this Honorable Court in the case of *L. & N. Ry. Co. vs. Mottley, supra,* in which transportation was furnished as part payment on a personal injury claim; *C. I & L. Ry. Co. vs. United States, supra,* in which advertising in the Munsey Magazine was

accepted as payment of transportation charges, and *N. Y. C. & H. R. R. Co. vs. Gray, supra,* in which a map was accepted in payment of transportation charges.

It seems clear to us that in the Lindell case, particularly in the quotation above, this Honorable Court had in mind a situation in which the amount of freight charges was agreed upon and the amount of the counterclaim was agreed to be at least equivalent to the freight charges and judgment had been entered on both.

We also call attention to the following language of the United States Supreme Court in the said Lindell case, appearing on page 201:

> "(3) The act ought not to be construed to put aside state laws and long established practice in respect of pleadings unless the intention of Congress so to do is plain."

We again suggest that this Honorable Court, in the language just quoted, manifestly had in mind the obligatory California statute which provided the defendant must set up a counterclaim arising out of the transaction constituting foundation of plaintiff's claim. Ordinarily the question as to whether a counterclaim may or may not be interposed is a matter of procedure depending upon the statutes of the forum. Minnesota does not have a statute requiring the setting up of the counterclaim. Its statute, which is permissive only, is included in the appendix to this brief.

In the Lindell case this court further said:

> "The appellant is liable to the appellee for damages in an amount at least equal to the charges sued for."

Apparently this court, in deciding the Lindell case, relied considerably upon the argument of convenience. Possibly it overlooked the fact that the Carmack Amendment to the

Interstate Commerce Act, as amended, 34 Stat. 534, 38 Stat. 1197, 41 Stat. 494, 44 Stat. 835, and the Newton Amendment to the Carmack Amendment of Mar. 4, 1927, Chap. 510, Sec. 3, 44 Stat. 1448, respectively permit a shipper or lawful holder of the bill of lading to sue the initial or originating carrier for the negligence of all the carriers and also permits the shipper and lawful holder of the bill of lading to sue the delivering or destination carrier for the negligence of all carriers. Under the present law, therefore, both the shipper and consignee can conveniently sue one carrier for the negligence of all. If the consignee has a claim for damage or loss he can conveniently sue the destination carrier under the Newton Act. On the other hand, the shipper can conveniently sue the originating carrier under the Carmack Amendment.

Lindell could conveniently have sued the originating carrier in California for the negligence of all carriers, including any negligence of the Chicago & Northwestern Railway Company.

In the Lindell case the California statute, Sections 439 and 440 of the *Code of Civil Procedure, supra,* compelled the decision reached in that case. In that case the counterclaim was for loss and damage on the identical shipment in the sum of $1,011.70. A claim for loss and damage is not created by the Federal Act, the counterclaim action being for less than $3,000.00, even though a proper diversity of citizenship existed between the shipper and the carrier the action could not be brought in the Federal Court. See *Judicial Code,* Section 24; Sec. 41, Title 28 U. S. C.

The cause of action which was set up as a counterclaim, if sued in an independent action by the shipper residing in California, would of necessity be sued in the state court of California.

Under the California statute the state court would be compelled to dismiss the action. The shipper's only remedy was the counterclaim in the action for freight charges or else to sue the destination or initial carrier in some state other than California.

There is, of course, some serious question as to whether or not the public policy expressed in the Hepburn, Elkins and Interstate Commerce Acts should be enforced where such a result would be reached.

We also call attention to the fact that the Circuit Court of Appeals certified that the shipper was acting in good faith and without collusion.

Will the Federal Court in the future pass upon the question as to whether the shipper and carrier are both acting in good faith without collusion in all actions brought to recover transportation charges in which counterclaims have been interposed? The task would seem to be a burdensome one. All of the decisions of the United States Supreme Court, prior to the Lindell case, apparently have aimed to separate the matter of disposition of transportation charges from all other controversies between shippers and carriers. This Honorable Court, the Interstate Commerce Commission and Congress have indicated that transportation charges should be promptly paid in money and not complicated by negotiations on unliquidated claims or paid in anything other than money.

We believe the Lindell case should be and will be construed by the United States Supreme Court to apply only to a case in which the state statute requires the counterclaim to be brought in the same suit, where the Federal Court has specifically found both shipper and carrier to be acting in good faith and without collusion and where the loss and damage occurs on the identical shipment and the

carrier therefore has failed to fully comply with its contract of carriage.

In the instant case the contract of shipment was complete while it was not complete in the Lindell case.

In the Lindell case the shipment was partially lost and damaged and, therefore, the freight charges were not fully earned because the carrier had failed in the performance of his contract to deliver the shipment without loss or damage.

In the instant case the weight apparently was incorrectly given on the bill of lading and respondent's Overcharge Department, believing all the charges had been paid, as well as an excess of $4.26, in error paid the petitioner $4.26 (R. 36). Whether the claim for $4.26 covered incorrect weight or loss of coal in transit is immaterial because the petitioner in its answer conceded that prior to the commencement of the suit here involved the petitioner's claim had been fully paid. The following is a portion of Paragraph IV of defendant's answer:

> "Admits that a carload of coal was transported substantially as alleged in Paragraph VIII of said Complaint, in subparagraphs one and two of said Paragraph VIII, except that defendant denies that said car was duly transported and alleges that the manner and form in which the same was transported by plaintiffs or their agents was negligent and caused loss and damage thereon *and that said loss and damage was paid for by plaintiffs.*"

In the Lindell case the carrier had not placed itself in a position for full and complete payment of the charges while the plaintiff in the instant case has.

The legal obligation upon the shipper or consignee and the carrier alike, to have freight charges paid in full within ninety-six hours from the time of delivery of the shipment to the consignee, remains an unqualified obligation where the shipment is delivered safely and undamaged as in the instant case and the time limit may not lawfully be extended beyond the ninety-six hours in order to liquidate a setoff before paying the tariff charges. The same legal obligation to pay tariff charges within ninety-six hours would not seem to obtain where, as in the Lindell case, the tariff charges were not fully earned because of the failure of the carrier to deliver all of the shipment without loss or damage thereto.

In a majority of cases involving claims for loss or damage arising on shipments moving over several different railroad carriers the suit is brought against the initial carrier. Actions for freight and demurrage charges on behalf of all railroads participating in the carriage of the goods is customarily brought by the delivering carrier. The result in the past has been that the claim for freight and demurrage charges and the claims for loss and damage to the shipment have been negotiated by the owner of the goods with different railroad companies. This creates no hardship on the shipping public as the Carmack and Newton Acts respectively permit actions to be commenced against either the originating or destination carrier and the carrier sued is responsible for the acts of all other carriers.

If counterclaims are permitted to be interposed in actions for freight and demurrage charges a great many shippers may refuse to pay transportation charges, which are fixed by tariff provisions, until unliquidated claims for loss and damage are disposed of in a manner satisfactory to them. The Interstate Commerce Rule *Ex Parte No. 73* will, to a considerable extent be nullified and we believe the entire web

and woof protecting the small shippers under the Elkins Act will be to a substantial extent destroyed.

One of the decisions which we feel is very persuasive as showing that permitting counterclaims generally to be interposed in actions for transportation charges will violate Section 1 of the Elkins Act is the case of *Hocking Valley Railway Co. vs. United States*, decided by the Circuit Court of Appeals of the Sixth Circuit, reported in 210 Fed. 735, Writ of Certiorari denied, 234 U. S. 757, and we take the liberty of quoting rather extensively from that decision. On page 740 the court said:

> "Upon the broad and underlying question whether it is such discrimination as is forbidden by the Elkins Act, in force in 1909, for the carrier to insist that shippers generally pay cash while it gives long credit to another similar shipper, and gives such credit pursuant to a previous contract—upon this broad question, we have no doubt. Such conduct, by its very terms, is discrimination. Shippers are not treated alike. Giving to one shipper four months' time in which to raise the money, even if interest is added, while the same privilege is denied to others, is plainly a 'concession of discrimination.' It also must be considered a concession or discrimination 'in respect to transportation'; it cannot be thought that these two words in this clause of the Elkins Act pertain only to a facility of transportation; they are used in immediate connection with 'rebate,' and so the clause must be intended to reach and affect the subject of freight payments. Whether, by this concession, it results that the property is 'transported at a less rate than that named in the tariffs' is not important, because the statutory condemnation extends also to concessions 'whereby any other advantage is given or discrimination

is practiced.' Such a discrimination might or might not be of pecuniary value to the freight payer. It is conceivable that a shipper, with sufficient working capital upon which he could not otherwise earn 5 per cent, would save money by paying cash; but it is clear that such a system of freight credits amounts to loaning money to the shipper, and is equivalent to providing for him working capital. To say that this cannot be considered a concession, or, when unfairly practiced, a discrimination, is, we think, to deny to these words their plain meaning."

On page 741 the Court said:

"Not only is the conclusion that the described practice does constitute that discrimination against which this provision is directed the natural inference from the words of the statute, but the general purpose of the law and of the amendments hereto be enforced, as repeatedly declared by the Supreme Court, indicates the same broad interpretation; if, indeed, there is in the word 'discrimination' ambiguity to be construed."

On page 743 the Court further said:

"Our conclusion here is not affected by these queries as to just how far the thought of unreasonableness still inheres in the proper definition of 'discrimination' under the Elkins Act. In the instant case, the four months' credit given to one favored shipper, and then extended for longer periods, was a material and substantial distinction. It was of that character which might permit the favored shipper to continue in business and drive all others out of business. It is obvious that if continued it might rapidly accumulate into a very large sum."

As we read the Lindell case, the Court has not passed upon the question as to whether the allowance of a right of setoff was contrary to the Elkins Act. Clearly a shipper can obtain a concession or advantage by means of a setoff. He can refuse to pay freight charges and eventually force the carrier to bring suit for them. When suit is started he can further postpone the date of paying his freight bill by filing a setoff. The net result often is that he obtains advantages or concessions amounting to credit, all of which is pointed out in *Hocking Valley Railroad Co. v. United States, supra.*

In that case it was held that the mere giving of four months' credit when interest was added, when the same right was not given to other shippers, constituted a concession or discrimination in violation of the Elkins Act.

A carrier who wished to help finance a shipper could easily arrange to have a damage claim filed and use this, together with the possibility of getting a setoff, as an excuse for failing to insist upon prompt payment of the freight charges.

In this and many other states interest can, of course, be recovered. The legal rate varies in different states. As we understand the rule in some states, it cannot be recovered. For instance, in Illinois it can only be recovered where the plaintiff has proved an unreasonable or vexatious delay, a matter which, of course, is difficult to prove. In many cases the value of freight money to the shipper as working capital exceeds the legal rate of interest.

In those cases where the freight bill is greater than the damage claimed in the setoff, the shipper does not come into court with clean hands when he has not paid or tendered the difference and courts should not put their stamp of approval on the practice. Even in those cases where the freight bill is less than the damage claim, under the law

of averages the shipper will be wrong fifty per cent of the time. In those cases where the shipper is wrong intentionally or through mistake of facts or law, he obtains a discrimination or advantage in violation of the Elkins Act and he has not in reality paid the full tariff charges. The tariff charges are made up with the idea that the freight must be paid upon delivery, or shortly thereafter, and if a shipper can by the device of a setoff, or threat of one, postpone for several years the time of payment, he is not paying what the law requires because he is paying the tariff amount less the value of the freight money for working capital.

A limited number of shippers only are in a position to file setoffs. The only shippers who can do so are those who are undercharged, consignees on the credit list, and consignors and the last reconsignor of shipments which are refused or unclaimed at destination. All other shippers are required to pay their freight bills before they can get the property. In many cases the prepayment of charges is made at point of origin. The small shipper with poor financial standing is not put upon the credit list and in order to get the shipment, must pay cash upon delivery, while his competitor with ample credit, who is upon the credit list, under the rulings of the Interstate Commerce Commission, may obtain the shipment without a payment and after obtaining the shipment refuse to pay the charges until a claim for damages, which may or may not be meritorious, is paid. The allowance of the right of setoffs or counterclaims, therefore, would work a discrimination between shippers—a few are in position to take advantage of a counterclaim, while most are not.

From a practical standpoint we believe all railroad attorneys know and most men whose duty it is to collect tariff charges know that many shippers employ the threat

of setoffs and also threats of routing business against the carrier to force favorable settlements of their damage claims. Most, if not all, railroads entirely separate and segregate their departments handling overcharge and undercharge claims from the Claim Department handling loss and damage claims. Railroad attorneys, we believe, generally insist that negotiations of undercharge and overcharge claims be entirely distinct and separate from the consideration of any other claims. This, we believe, is nearly essential in order that the purposes of the Interstate Commerce Act and the Elkins Amendment thereto may be complied with as at present.

Apparently the decisions permitting counterclaims are based upon the matter of convenience. The argument of convenience advanced does not seem to us to be sound. The allowance of setoffs and counterclaims will not save the courts' time for there rarely is occasion for two lawsuits. The amount of the transportation charges is fixed by the tariffs and is seldom in dispute, and in the few cases where there is an honest dispute, there almost never is the coincidence of a damage claim on the shipment.

The allowance of setoffs, therefore, burdens the courts not only with the damage claim but also with the claim for freight charges. The same evidence does not suffice for both claims.

Congress, for the convenience of the shippers, has seen fit to make both the initial and destination carriers responsible for the acts of all other carriers participating in the shipment. Independent of statute such right would not exist. Shippers, therefore, in actions against railroads, hold a favored position and do not require the right of counterclaim urged by the petitioner.

In *New Orleans & N. E. R. Co. vs. Harris*, 247 U. S. 367,

38 Sup. Ct. 535, at 536, in an action brought under the Federal Employers' Liability Act, it was held:

> "The question of burden of proof is a matter of substance and not subject to control by laws of the several states."

The question of interposing counterclaims in actions brought to recover tariff charges involves the matter of compliance with the provisions of the Elkins Act and should not be subject to control of the several states.

At common law the right of setoff and counterclaim did not exist except to the limited extent that recoupment was permitted. A state statute of procedure which permits the interposition of setoffs or counterclaims should not be permitted to nullify in any degree the intention of Congress to prevent discrimination as between shippers as set out in the Interstate Commerce Act and the Elkins and Hepburn amendments thereto.

CONCLUSION.

It is respectfully submitted that the check in question was handled in a manner authorized by the petitioner on the check in that it was "Collectible at par through the Federal Reserve Bank at Minneapolis." That freight charges can be paid in money only and that a check is not money. That an obligation rests upon the petitioner which is equal to the obligation of the respondent to see that freight charges actually are paid in money. That permitting counterclaims to be interposed in suits brought to recover outstanding freight charges will interfere with the uniform collection of cash charges from all shippers, will unduly extend credit to some shippers and will open the door to discriminations under color of counterclaims and offsets.

In the instant case the contract of carriage was complete before suit was brought while this was not true in the Lindell case. The shipment in this case had been delivered at destination before the subject of counterclaim had arisen and the counterclaim did not involve the contract of carriage. In the Lindell case the counterclaim was for loss and damage on the identical shipment and, therefore, did involve the contract of carriage. The Minnesota statute, relating to counterclaims, unlike the California statute, is permissive only. The interposition of counterclaims is not essential to the convenience of either the shipper or the courts.

It is respectfully submitted that the Honorable Circuit Court of Appeals for the Eighth Circuit correctly decided this case and its action should be affirmed.

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APPENDIX.

Section 2 of the Interstate Commerce Act as amended. Section 2, Title 49, U. S. C., reads as follows:

"2. Special rates and rebates prohibited.—If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, C. 104, §2, 24 Stat. 379; Feb. 28, 1920, C. 91, §404, 41 Stat. 479.)"

Section 3 of the Interstate Commerce Act as amended contains the following (Sec. 3, Title 49, U. S. C.):

"3. Preferences, interchange of traffic, terminal facilities.—

"(1) Undue preferences or prejudices prohibited.—It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect

whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"(2) Payment of freight as prerequisite to delivery. —No carrier by railroad subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: Provided, that the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia."

Sec. 1 of the Elkins Amendment to the Interstate Commerce Act (Sec. 41, Title 49, U. S. C.) reads as follows:

"Section 41. Liability of corporation carriers and agents; offenses and penalties.— (Italics my own.)

"(1) Liability of corporation common carriers, offenses, penalties, jurisdiction. — Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under Sections 41, 42, or 43, shall also be held to be a misdemeanor committed

by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by Sections 41, 42 or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter *whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant or give, or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor*, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: Provided, that any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42 or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addi-

tion to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"(2) Liabilities for acts of agents; departure from published rates.—In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under Sections 41, 42, or 43, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

"(3) Receiving rebates; additional penalty and recovery thereof.—*Any person*, corporation, or company who shall deliver property for interstate transportation

to any common carrier, subject to the provisions of Sections 41, 42, or 43, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, *who shall* knowingly by employee, agent, officer, or otherwise, directly or indirectly, *by* or through *any means* or device *whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration* as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be. (Feb. 19, 1903, c.

708, §1, 32 Stat. 847; June 29, 1906, c. 3591, §2, 34 Stat. 587.)"

The Heburn Amendment to the Interstate Commerce Act contains the following in Subdivision 7, Sec. 6, Title 49 U. S. C.:

"(7) Transportation without filing and publishing rates forbidden; rebates; privileges.—No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Minnesota statutes relative to counterclaims:

Sec. 7756 of *1913 General Statutes of Minnesota*, Sec. 9253 *Mason's Minnesota Statutes for 1927* contains the following:

"7756. The action shall contain: * * * (2) A statement, in ordinary and concise language, of any new matter constituting a counterclaim or defense. * * *."

Sec. 7757 of *1913 General Statutes of Minnesota*, Sec. 9254 *Mason's Minnesota Statutes for 1927*, reads as follows:

"7757. Requisites of a counterclaim.—Pleading does not admit.—The pleading of a counterclaim shall not be construed as an admission of any cause of action alleged in the complaint. Such counterclaim must be an existing one in favor of a defendant and against a plaintiff, between whom several judgments might be had in the action, and must be:

"1. A cause of action arising out of the contract or transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action; or

"2. In an action arising on contract, another cause of action arising also on contract, and existing when the action was begun."

Sec. 7758 of *1913 General Statutes of Minnesota*, Sec. 9255 *Mason's Minnesota Statutes for 1927*, reads as follows:

"7758. Several defenses, etc., how pleaded—answer and demurrer.—The defendant may set forth by answer as many defenses and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed. He may also demur to one or more of several causes of action in the complaint and answer to the remainder."

Ex Parte No. 73:

"Order.

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of June, A. D. 1930.

"*Ex Parte* No. 73.

"*In re* Section 3 of the Interstate Commerce Act, as

amended by Section 405 of the Transportation Act, 1920.

"*It appearing*, that Section 3, Paragraph (2) of the Interstate Commerce Act, as amended by Section 405 of the Transportation Act, 1920, provides:

"From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination; *Provided*, that the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

"*It further appearing*, that a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"*It is ordered*, that the following rules and regulations be, and they are hereby prescribed to become effective on July 1, 1920, and to remain in force until the further order of the Commission:

"1. Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be

sufficient to insure payment of the tariff charges within the period of credit herein specified, may relinquish possession of the freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons being herein called shippers, for a period of ninety-six hours to be computed as follows:

"(A) Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight, the ninety-six hours of credit shall run from the first 4:00 P. M. following the delivery of the freight.

"(B) Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the ninety-six hours of credit shall run from the first 4:00 P. M., following the presentation of the freight bill.

"2. Every such carrier shall present freight bills to shippers not later than the first 4 P. M. following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 4 P. M. following the day upon which sufficient information becomes available to the delivering agent of the carrier.

"3. Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

"4. Sundays and legal holidays, other than Saturday

half holidays, may be excluded from the computation of the period of credit.

"5. The mailing by the shipper of valid checks, drafts or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time."

SUPREME COURT OF THE UNITED STATES.

No. 47.—October Term, 1930.

Fullerton Lumber Company, Petitioner, *vs.* Chicago, Milwaukee, St. Paul & Pacific Railroad Co.	On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 24, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Chicago, Milwaukee, Saint Paul & Pacific Railroad Company brought this action in the federal court for Minnesota to recover from the Fullerton Lumber Company freight charges on a carload of coal shipped to it. The case was tried without a jury. The defence was payment. It appeared that, upon delivery of the car, the carrier had, as customary, accepted the defendant's check on a local bank for the amount of the charges; that it had delayed presenting the check for payment; and that meanwhile the bank had failed. The defendant contended that it was relieved from liability because of the carrier's unjustifiable delay in presenting the check. The trial court ruled that the Interstate Commerce Act requires that a carrier's charges be paid strictly in currency; and that since the check had not been paid, the defendant was liable even if the carrier's failure to receive the money was due wholly to its own negligence. Judgment entered for the carrier was affirmed by the Circuit Court of Appeals. 36 F. (2d) 180. This Court granted a writ of certiorari. 281 U. S. 709.

It has long been settled that payment of a carrier's charges must be made in money; and that the payment must be cash as distinguished from credit.[1] The purpose of the requirement is solely to

[1]Conference Ruling No. 207 of Interstate Commerce Commission (September 15, 1906); Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 476; Chicago, Indianapolis & Louisville Ry. Co. v. United States, 219 U. S. 486; Chicago & North Western Ry. Co. v. Lindell, 281 U. S. 14, 16. Compare Ex parte No. 73, 57 I. C. C. 591, 596; 63 I. C. C. 375; 69 I. C. C. 351. Rules

prevent rebates or unjust discrimination and to ensure observance of the tariff rates. Compare *Chicago & Northwestern Ry. Co.* v. *Lindell*, 281 U. S. 14, 16. The Interstate Commerce Act does not in terms prescribe that the charges shall be paid in money; that is, in coin or currency. There is no reason for denying to the parties the convenience and safety incident to making payment, in accordance with the prevailing usage of business, by means of a check payable on demand drawn on a going bank in which the drawer has an ample deposit.

Whether in the case at bar the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of law generallly applicable to payment by check. These, and other questions which have been argued, need not be considered by us.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

promulgated June 4, 1920, permitted the carrier to extend credit for ninety-six hours after delivery, and provided that "the mailing [within this prescribed period] by the shipper of valid checks, drafts, or money orders which are satisfactory to the carrier," should be deemed proper payment. Ex parte No. 73, Rule 5, 57 I. C. C. 596a, 596b.